No. 80-1268

In the Supreme Court of the United States

OCTOBER TERM, 1980

MONONGAHELA POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner argues that the court of appeals and Interstate Commerce Commission erred in holding that petitioner was bound by its election of remedies for the recovery of certain demurrage charges from respondent Baltimore and Ohio Railroad Company (B & 0).

1. Petitioner Monongahela Power Company filed a complaint with the Interstate Commerce Commission challenging the lawfulness of certain demurrage charges[1] paid

[1]Demurrage is the charge imposed on shippers and receivers for the detention of freight cars beyond the free time for loading and unloading (Pet. App. 2a n.2).

by petitioner to B & O on coal cars detained at petitioner's Harrison, West Virginia, power station during a portion of the winter of 1977.[2] The Commission issued decisions (Pet. App. 19a-27a) dismissing the complaint on the ground that petitioner had settled the claim with B & O under special procedures adopted by the Commission in Docket No. 36574, *Petition of Railroads Seeking Authorization to Waive Demurrage Charges Caused By Severe Winter Weather* (Aug. 3, 1977), and that petitioner therefore was estopped from seeking further relief from the Commission on the same claim.

In the order issued in Docket No. 36574 (Pet. App. 9a-18a), the Commission authorized certain railroads, including B & O, to waive part of the demurrage charges incurred by shippers and receivers during the severe winter weather conditions experienced between December 28, 1976, and March 15, 1977, which had rendered difficult or impossible the loading and unloading of cars. The decision also adopted rules and procedures for shippers and receivers to file waiver claims (Pet. App. 17a). Petitioner filed a claim with B & O pursuant to the special procedures established in Docket No. 36574, seeking relief from demurrage charges that had accrued on cars it was unable to unload at the Harrison plant. Petitioner requested and received $521,500 in settlement from B & O. That amount represented the difference between the applicable demurrage charges of $1,104,010 and the reduced basis of $582,510 calculated pursuant to the standards set forth in the order in Docket No. 36574. Petitioner then filed the instant claim with the Commission seeking to recover the remaining $582,510 or, in the alternative, to recover the "penalty"

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[2]Petitioner also filed a complaint challenging the lawfulness of demurrage charges at its Willow Island power station in West Virginia. That complaint is not in issue here (Pet. App. 2a n.3).

portion of the demurrage charges.[3] (Pet. App. 3a, 19a, 21a). The Commission dismissed the claim, and petitioner sought review in the court of appeals.

The court of appeals affirmed (Pet. App. 1a-8a). The majority agreed with the Commission's interpretation of the order in Docket No. 36574 as affording three mutually-exclusive options to a shipper or receiver such as petitioner: (1) it could file a claim under the special procedures approved in Docket No. 36574 and reach a binding settlement with the carrier; (2) it could file a claim under the special procedures and then, should it fail to reach a settlement with the carrier, seek relief through the Commission's regular procedures; or (3) it could eschew the special procedures and seek relief directly from the Commission under the Commission's regular procedures (*id.* at 4a-5a; see also *id.* at 21a, 26a).[4] The court concluded that because petitioner had voluntarily elected the first of these options and entered into a settlement with B & O under the special procedures, it could not reject the consequences of that election and seek further relief from the Commission under the third option (*id.* at 5a-6a). Judge Widener dissented, concluding that the Commission's decision in Docket No. 36574 should be interpreted to allow petitioner to file a complaint with the Commission after it had reached a settlement with B & O on the same claim (*id.* at 7a-8a).

2. The decision below is not in conflict with any decision of this Court or of any other court of appeals. Moreover,

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[3]The "penalty" portion of a demurrage charge refers to the portion of the charge that exceeds the sum of per diem, administrative, and other expenses incurred by the delivering railroad (Pet. App. 3a n.4).

[4]The court of appeals considered only the correctness of the Commission's interpretation of its prior decision in Docket No. 36574, not the validity of the earlier decision, because petitioner did not challenge that order within the 60-day period allowed by 28 U.S.C. 2344 (Pet. App. 4a & n.5).

the decision turns on the Commission's interpretation of its own prior unpublished order in Docket No. 36574, which applies only to the demurrage charges of certain carriers during the period of harsh weather conditions between December 28, 1976, and March 15, 1977. The Commission's interpretation of its own prior order in these limited circumstances raises no question of continuing or general importance warranting this Court's attention.

In any event, the court of appeals' decision sustaining the Commission's interpretation of its order in Docket No. 36574 as requiring an election of remedies is certainly a reasonable one. The Commission's order in Docket No. 36574, which approved (with certain modifications) the carriers' proposal to waive demurrage charges in certain circumstances, expressly states (Pet. App. 12a; footnote omitted):

> [S]hippers or receivers will have the option of applying for the claim under the involved proposal, filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from alleged unjust and unreasonable demurrage charges under the Commission's regular procedures, or by initially seeking relief from the Commission under its regular procedures.

As the court of appeals observed, by virtue of this language, "[p]lainly No. 36574 was a tender of orderly *optional* elections available to shippers and carriers. The use of the article 'or' explicitly indicates that the shipper could choose only one of the alternatives" (Pet. App. 4a; emphasis in original). Because petitioner chose the first alternative and entered into a settlement with B & O, it is barred from subsequently electing the third option by pursuing the

Commission's regular procedures to recover some or all of the amounts it did not obtain from B & O under the settlement.[5]

The order in Docket No. 36574 makes clear in another respect as well that a shipper or receiver that pursues the special procedure will be bound by its election of remedies. The order states (Pet. App. 12a n.4).:

> Shippers and receivers are encouraged to file claims initially with the carrier. The procedures adopted and standards applied for settlement under the claim procedures will be strictly voluntary and will not bind individual shippers who either do not qualify for settlement thereunder or do not invoke the claim procedures under the proposal.

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[5]Petitioner contends (Pet. 6, 17) that the sentence in the order in Docket No. 36574 preceding the description of a shipper's options quoted in the text establishes that the order does not require an election of remedies. That sentence states that the Commission's approval of the carriers' proposal "does not prejudice * * * the filing of additional claims for greater relief by the shippers" (Pet. App. 12a). But, contrary to petitioner's apparent contention, this sentence only provides that the Commission's approval of the carriers' *proposal* to allow waiver of a portion of the demurrage charges (see Pet. App. 17a, para. 6) would not prejudice the right of an individual shipper to file claims with the Commission to recover greater amounts. This sentence does *not* state that a shipper that actually takes advantage of the proposal by filing an individual claim and receiving a settlement would not be "prejudiced" in a subsequent effort to present the same claim to the Commission.

The Note to Appendix B of the Commission's order in Docket No. 36574, also relied upon by petitioner (Pet. 17 n.18) and Judge Widener in dissent (Pet. App. 7a), is only a brief summary of the Commission's order and cannot detract from the more extensive discussion in the body of the order that was relied upon by the Commission and the majority of the court of appeals. As the court below remarked, petitioner's "construction would mean that the Commission, despite its deliberation and care in framing the proposal, determined to wipe out the whole of it with the second sentence of the 'Note.' We cannot accept such an interpretation" (*id.* at 6a).

The clear import of this statement is that the special procedures *would* bind individual shippers who did invoke them, "qualif[ied] for settlement thereunder," and received a settlement. And surely there is nothing remarkable or unfair in barring a shipper who enters into a settlement with a carrier from relitigating the same claim in a separate proceeding before the Commission.

3. Petitioner attempts to evade the narrow issue presented by this case (and correctly decided by the court of appeals) by arguing that it has been deprived of its right to a hearing on the reasonableness of the demurrage charges it paid to B & O. But the court of appeals properly declined to address that argument, because it constitutes a collateral attack on the Commission's approval of the special procedures in Docket No. 36574—which did not provide for a hearing[6]—long after expiration of the 60-day period for seeking review of that order in the court of appeals. In any event, petitioner was not required to resort to the special procedures for waiver of demurrage charges approved in Docket No. 36574. It was entitled to proceed in the first instance by a complaint filed with the Commission under the Commission's regular procedures. If it had filed a complaint, it could have obtained a hearing and a determination of the reasonableness of the demurrage charges in the normal course. It elected not to do so and must be bound to its decision to pursue the expedited remedy fashioned for its benefit.

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[6]The Commission expressly rejected the carriers' suggestion (Pet. App. 10a, para. 4) that it approve each individual claim filed with the carrier under the proposal on the ground that "it would not be practical to verify each claim" (Pet. App. 13a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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